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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 1103210208-2676-02]

RIN 0648-BA89

High Seas Driftnet Fishing Moratorium Protection Act;  
Identification and Certification Procedures to Address Shark  
Conservation

AGENCY: National Marine Fisheries Service (NMFS), National  
Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final action sets forth identification and  
certification procedures to implement provisions of the Shark  
Conservation Act, which amended the High Seas Driftnet Fishing  
Moratorium Protection Act (Moratorium Protection Act), to  
address shark conservation in areas beyond any national  
jurisdiction. This action also amends the definition of  
illegal, unreported, or unregulated (IUU) fishing for purposes  
of the Moratorium Protection Act.

DATES: This rule is effective [insert date of publication in the  
Federal Register].

FOR FURTHER INFORMATION CONTACT: Laura Cimo, Trade and Marine  
Stewardship Division, Office of International Affairs, NMFS, at

(301) 427-8359. More information on the Moratorium Protection Act can be found on the NMFS Web site at <http://www.nmfs.noaa.gov/msa2007/intlprovisions.html>.

#### SUPPLEMENTARY INFORMATION:

##### Background

On January 12, 2011, the National Marine Fisheries Service (NMFS) published a rule (76 FR 2011) establishing identification and certification procedures to address illegal, unreported, or unregulated (IUU) fishing activities and bycatch of protected living marine resources (PLMRs) pursuant to the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act) (50 CFR 300.200 et seq.) (16 U.S.C. 1826h-k). This action modifies those identification and certification procedures to reflect amendments to the Moratorium Protection Act made by the Shark Conservation Act (Public Law 111-348), enacted on January 4, 2011.

On July 10, 2012, NOAA published a proposed rule establishing identification and certification procedures to implement the international provisions of the Shark Conservation Act. This rule also proposed changes to the definition of IUU fishing for purposes of the Moratorium Protection Act (see 50 CFR 300.201). The background information on this action was published in the proposed rule (77 FR 40553, July 10, 2012) and is not repeated here.

Briefly, under these regulations, in addition to identifying nations based on IUU fishing or bycatch of protected living marine resources, NMFS will identify a foreign nation in a biennial report to Congress if fishing vessels of that nation have been engaged during the preceding calendar year in fishing activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks and the nation has not adopted a regulatory program for the conservation of sharks. Such conservation measures must be comparable to those of the United States, taking into account different conditions.

A brief summary of how NMFS intends to apply Section 609 of the Moratorium Protection Act and its implementing regulations is repeated below.

#### Application of IUU Fishing Identification Criteria

In addition to the regulatory changes identified above, NMFS has reconsidered the manner in which it applies Section 609 of the Moratorium Protection Act and its implementing regulations. To date, NMFS has primarily applied this Act and implementing regulations to identify a nation when the nation's vessels were engaged in IUU fishing activity that was directly attributable to specific vessel conduct.

After two cycles of identification, NMFS has determined that these provisions could be applied more broadly. In order to

more comprehensively address IUU fishing, we must consider not only the prohibited actions of fishing vessels but also non-compliance in the form of action or inaction at the national level that leads to IUU fishing. To further this goal, NMFS will identify a nation based on the nation's actions or inactions that lead to fishing by vessels registered under their flag that is not in accordance with regional fishery management organization (RFMO) conservation and management measures.

For example, under the approach adopted in this final rule, NMFS could identify a nation when the nation has failed to implement measures that are required by a RFMO to which the United States is a party, and as a result the fishing vessels of that nation operated in a manner inconsistent with the relevant RFMO conservation and management measures.

This approach is consistent with the plain language of the statutory guidelines provided in section 609(e)(3)(A) of the Moratorium Protection Act for the IUU fishing definition. These statutory guidelines specifically mention certain RFMO conservation and management measures, such as catch limits or quotas, that must be implemented by nations that are parties to the RFMO and cannot necessarily be attributed to specific fishing vessels. For example, RFMOs can establish quotas for their member nations. Each nation bears the responsibility for implementing and adhering to the quota it received. Individual

fishing vessels, therefore, cannot be found in violation of the RFMO's quota, but action or inaction by the flag nation could result in fishing activity in violation of the quota. In addition to specific situations mentioned in the minimum statutory guidelines for the IUU fishing definition, there are other circumstances in which fishing activities might violate RFMO measures because of a nation's failure to govern its own fishing vessels or carry out its own responsibilities. For example, RFMOs require parties to implement data reporting requirements. In most cases, the nations, and not individual vessels, compile and report the requisite information to comply with RFMO conservation and management measures. Because many measures are inherently a nation's responsibility, Congress evidently intended NMFS to be able to identify a nation based on its failure to fulfill the requirements of the relevant RFMO and the operations of the nation's fisheries in light of this failure.

Under the approach adopted in this final rule, a nation could be identified for fishing activities that were illegal, unregulated, or unreported because of national action or inaction, including, consistent with the examples discussed above, fishing activities that resulted in the nation exceeding a harvest quota granted by the relevant RFMO because the nation

failed to implement measures to prevent such overharvest, and fishing activities that were not reported because the nation failed to carry out its responsibilities for reporting to ensure collection of such information.

Responses to public comments received on the proposed rule are found below.

#### Changes from the Proposed Rule

The final rule includes minor clarifications to procedures that apply when a nation fails to receive a positive certification under the Act. First, NMFS makes minor revisions to documentation requirements. Current regulations at 50 CFR 300.205(b)(2), 300.206(c), and 300.207(c) refer to "documentation of admissibility" that must be "executed" by a duly authorized official of an identified nation when fish or fish products are imported into the United States. In an effort to use language that is more clearly understood, this final rule replaces the word "executed" with "properly completed and signed." To be consistent with the form that will accompany fish and fish products entering the United States for this rulemaking, this final rule changes the term "documentation" to "certification," and clarifies that the certification must be signed by the importer of record prior to submission to NMFS. This final rule also includes a reminder that other import

documentation requirements may apply in addition to this certification.

Second, the final rule clarifies the roles of the Departments of Treasury and Homeland Security consistent with Treasury Order 100-16. Under 50 CFR 300.205(b)(1) and (b)(4), the Secretary of Commerce is responsible for notifying the public of both the imposition and removal of trade restrictive measures, with the concurrence of the Secretary of State and in cooperation with the Secretary of Treasury. Treasury Order 100-16 provides that the Secretaries of Treasury and Homeland Security share certain responsibilities pertaining to trade restrictive measures. The final rule clarifies that the Secretary of Commerce will issue these notices in cooperation with the Secretaries of Treasury, Homeland Security, and State.

Finally, the rule now includes text from the High Seas Driftnet Fisheries Enforcement Act (16 U.S.C. 1826a) regarding the denial of port privileges. In describing the denial of port privileges, current regulations at 50 C.F.R. 300.204(a) only include text from the High Seas Driftnet Fisheries Enforcement Act regarding the denial of entry of IUU fishing vessels into the navigable waters of the United States. However, the Act also includes a second provision on withholding or revoking clearance of vessels, which NMFS has included in the final rule.

Response to Public Comments

NMFS received 17 public comments on the proposed rule. These comments came from several environmental non-governmental organizations, fishing industry groups, including fish importers, and foreign governments and trade organizations. NMFS did not make changes to the proposed rule in response to comments received, since many of the suggested changes were not consistent with statutory authority or were outside the scope of this rulemaking.

#### General Comments

NMFS received several comments in support of the proposed regulations. Many commenters suggested that the regulation could help "level the playing field" for U.S. fishermen who are competing in a global market against foreign fishermen that are not required to abide by regulations as stringent as those in the United States.

#### Application of Regulations to Foreign Vessels

Comment 1: One commenter asked NMFS to clarify that the regulation does not apply to U.S. vessels who may have committed minor infractions of domestic fisheries regulations.

Response: NMFS agrees that the final regulation does not apply to U.S. vessels. The Moratorium Protection Act directs the Secretary of Commerce to identify and certify only foreign nations for having vessels engaged in IUU fishing, bycatch of protected living marine resources, and shark catch on the high



seas. U.S. fishermen are, however, subject to regulation under other domestic laws, including but not limited to, the Magnuson-Stevens Fishery Conservation and Management Act, the Marine Mammal Protection Act, the Endangered Species Act, and the Lacey Act.

#### Application of Import Prohibitions

Comment 2: One commenter raised concerns that language in the proposed rule will lead to inconsistent application of the regulations. In particular, the commenter recommended deleting language regarding NMFS taking into account different conditions when making decisions to identify nations for having vessels engaged in shark catch on the high seas if they do not have a comparable regulatory program to the United States. They asserted that NMFS must use standards consistently across all nations to comply with the World Trade Organization (WTO) Agreement.

Response: The Moratorium Protection Act, at 16 U.S.C. 1826k(a)(2)(B), requires that NMFS take into account different conditions when making identification decisions for nations whose vessels engaged in shark catch beyond any national jurisdiction. While NMFS cannot delete this requirement, NMFS is mindful of U.S. obligations under the WTO Agreement when implementing the provisions of the Moratorium Protection Act, and works with the Office of the U.S. Trade Representative to

ensure that any actions taken under the Moratorium Protection Act are consistent with these obligations. Agency actions and recommendations under this final rule will be in accordance with U.S. obligations under applicable international law, including the WTO Agreement.

By taking into account different conditions in a nation's fishery, including conditions that could bear on the feasibility and effectiveness of certain bycatch mitigation measures, NMFS considers alternative measures implemented by the nation that are as effective or more effective than those applicable in U.S. fisheries. This flexibility helps to ensure that identification and certification determinations do not result in the imposition of trade-restrictive measures that are arbitrary or unjustifiably discriminatory because they hold a nation to a higher standard than measures applied in U.S. fisheries.

Comment 3: Commenters suggested broadening the scope of potential trade restrictive measures that could be applied to an identified nation that fails to receive a positive certification to, at a minimum, include all fish or fish products from such nation. If verifiable progress is not made by the nation to control the actions of its vessels, they suggested NMFS develop a process to expeditiously broaden the scope of trade restrictions to cover all goods from that nation that are imported into the United States.

Response: The Moratorium Protection Act limits the scope of import prohibitions that can initially be applied to an identified nation that fails to receive a positive certification. For a nation identified for IUU fishing, import prohibitions would be limited to fish and fish products managed under an applicable international fishery agreement. If there is no applicable international fishery agreement, such prohibitions would only apply to fish and fish products caught by vessels engaged in IUU fishing. For a nation identified for either bycatch or shark catch, import prohibitions would be limited to those that address the relevant fishing activities or practices for which such nations were identified in the biennial report.

However, if after six months following the imposition of import prohibitions the Secretary of Commerce certifies to the President that the prohibitions are insufficient to cause a nation to effectively address such IUU fishing activity, bycatch, or shark catch or that the nation has taken retaliatory action against the United States, the President may (under authority of the Pelly Amendment at 22 U.S.C. 1978a) direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the nation for any duration as the President determines appropriate

and to the extent that such prohibition is sanctioned by the WTO.

Comment 4: Another commenter suggested the regulation make it clear that, in the case of an identified nation that fails to receive a positive certification, trade restrictive measures can be applied to all fisheries that are managed under the applicable regional fishery management organization (RFMO), regardless of whether catch of such fish triggered the nation's identification. They specifically requested the deletion of the following statement: "Such recommendation would address the relevant fishing activities or practices for which such nations were identified in the biennial report," since they believe it could be misinterpreted to further limit the scope of potential sanctions by referring only to the fishing activities that give rise to the IUU violations.

Response: NMFS believes the current language does not unduly limit the scope of import prohibitions that can be put into place. Rather, the language ensures that any recommendations for import prohibitions will help address the activities for which the nation was identified. Under the Moratorium Protection Act, if an identified nation fails to receive a positive certification, import prohibitions may potentially be applied to fish and fish products managed under the applicable international fishery agreement.

Comment 5: One commenter was concerned that the proposed regulation does not specify which types of fish and fishing products could face market entry restrictions and raised concerns that the application of trade restrictive measures could be contrary to the spirit of international trade.

Response: The Moratorium Protection Act limits the scope of import prohibitions that can be applied, but does not specify which fisheries products would be prohibited from importation into the United States. This final regulation requires that the Secretary of Commerce recommend the imposition of import prohibitions with respect to fish and fish products associated with the fishing activity that served as the basis for the nation's identification. The regulation further provides that recommended import prohibitions be in accordance with U.S. obligations under applicable international trade law, including the WTO Agreement.

#### Traceability of Fisheries Products

Comment 6: A few commenters suggested that NMFS and other governmental agencies continue to work towards traceability of imported fisheries products to monitor fisheries products coming into the United States and help implement the provisions of the Moratorium Protection Act.

Response: NMFS agrees. However, establishment of a broad traceability program for all fisheries products is beyond the

scope of this rulemaking. Nonetheless, NMFS has taken steps under the Moratorium Protection Act and other laws to improve traceability of fisheries products. With respect to this rulemaking, if import prohibitions are put in place for an identified nation that has failed to receive a positive certification under the Moratorium Protection Act, fish and fish products from the identified nation entering the United States must be accompanied by a completed certification of admissibility available from NMFS. The certification of admissibility must be properly completed and signed by a duly authorized official of the identified nation. The certification must also be signed by the importer of record and submitted to NMFS in a format (electronic facsimile (fax), the Internet, etc.) specified by NMFS for validation.

To assist with the traceability of imported fisheries products, NMFS has implemented several import monitoring programs under other authorities. These include the Tuna Tracking and Verification Program (NOAA Form 370 - Fisheries Certificate of Origin) implemented under the Dolphin Protection Consumer Information Act and Marine Mammal Protection Act. This program ensures that imported tuna products are correctly labeled as "dolphin-safe." Similarly, we have implemented a bluefin tuna catch documentation scheme (now a paper-based system, but moving in 2013 to an electronic tracking system)

pursuant to U.S. obligations as a Contracting Party to the International Convention for the Conservation of Atlantic Tunas (ICCAT) and under the authority of the Atlantic Tunas Convention Act (ATCA). ICCAT also has swordfish and bigeye tuna statistical document programs that are implemented under ATCA authority. NMFS has also implemented an Antarctic toothfish import monitoring program which requires a catch certificate and pre-approval for imports under the authority of the Antarctic Marine Living Resources Conservation Act.

Comment 7: One commenter encouraged NMFS to communicate the requirements of the Moratorium Protection Act proactively and as quickly as possible to the international community to ensure knowledge of the regulation and its implications.

Response: NMFS agrees and has widely shared information on the provisions of the Moratorium Protection Act with foreign governments at every opportunity, including meetings of RFMOs, the Food and Agriculture Organization of the United Nations (FAO), and other international fora, as appropriate. NMFS has also provided information to many countries during bilateral meetings and through the U.S. State Department.

#### Verification of Information

Comment 8: One commenter expressed concern that information could be used as the basis for a nation's identification even if

the information is not credible and is intended to harm a particular nation.

Response: NMFS makes every effort to validate allegations that a nation's vessels are engaged in fishing activities that could form the basis of identification under the Moratorium Protection Act. Nations are provided an opportunity to address such information before identification decisions are made.

#### Subsidies for Illegal Fishing

Comment 9: One commenter suggested that when identifying nations, NMFS must identify nations that subsidize illegal fishing.

Response: NMFS does not have authority under the statute to address fishing subsidies. However, the United States fully participates in international negotiations to eliminate harmful fishing subsidies, including the subsidization of vessels identified as having engaged in IUU fishing.

#### Shark Provisions

Comment 10: One commenter suggested that when identifying nations, NMFS take a strong stance in specifying requirements for shark conservation measures when looking at a nation's comparable regulatory program.

Response: NMFS agrees that strong shark measures must be adopted domestically and strives to help ensure compliance with measures that are adopted internationally. NMFS will be taking



a comprehensive look at each nation's domestic regulatory program for sharks when determining whether that nation's regulatory program is comparable to the United States, taking into account different conditions.

Comment 11: One commenter suggested that NMFS amend the regulation so that it applies to shark catch in waters under national jurisdiction, as well as shark catch on the high seas.

Response: The Moratorium Protection Act, as amended by the Shark Conservation Act, only authorizes NMFS to identify nations for having vessels engaged shark catch beyond any national jurisdiction. Expanding the criteria for shark catch identifications to areas within any national jurisdiction would be outside the scope of the statute. However, shark fishing activity that occurs in another nation's waters could be a basis for identification as IUU fishing if such activity violates a conservation and management measure required under an international fishery management agreement to which the United States is a party.

Comment 12: One commenter suggested removing text allowing NMFS to take into account relevant matters, including, but not limited to, the history, nature, circumstances, and gravity of the fishing activities that target or incidentally catch sharks beyond any national jurisdiction, when making identification decisions. The commenter is concerned that the language

provides a loophole that could be used as a basis for not identifying nations that are harvesting and not sustainably managing shark species.

Response: The purpose of the language in the proposed rule is to acknowledge different circumstances that may lead to a nation's identification. The language provides discretion for practicable implementation of the law and allows NMFS to consider all relevant circumstances, such as whether a nation has repeatedly engaged in fishing activities of concern, when making identification decisions.

Comment 13: Several commenters suggested that NMFS examine the use of circle hooks by a nation identified for having vessels engaged in shark catch on the high seas when determining whether to issue a positive certification.

Response: When issuing a certification decision for a nation identified for having vessels engaged in shark catch on the high seas, when appropriate, NMFS will consider, among other things, whether circle hooks are required for U.S. fishermen in the same or similar fisheries, and determine whether the nation has measures in place that are comparable in effectiveness to those required in U.S. fisheries. NMFS will not mandate use of circle hooks in pelagic longline fisheries for shark certifications because such measures are not currently required

in U.S. fisheries to mitigate shark bycatch, and may in fact increase shark mortality in some cases.

Comment 14: A commenter expressed concern that U.S. domestic regulations have not been proposed that would implement the requirement that U.S. fishermen must land sharks with their fins naturally attached. The commenter urged NMFS to move forward and issue implementing U.S. regulations immediately.

Response: These regulations only implement provisions of the Shark Conservation Act that amended the Moratorium Protection Act. NMFS will address the domestic fisheries provisions of the Act in separate rulemakings.

Comment 15: Several commenters suggested that NMFS encourage other nations to adopt a National Plan of Action for Sharks.

Response: The United States continues to encourage other nations to adopt and implement a National Plan of Action for Sharks.

Comment 16: When determining whether a nation has a comparable regulatory program to the United States, several commenters suggested that NMFS investigate whether the nation has domestic legislation to implement international requirements and their National Plan of Action for Sharks, as well as effective enforcement.

Response: If NMFS obtains information that a nation has vessels engaged in shark catch on the high seas, we will holistically examine that nation's regulatory program for sharks to determine if it is comparable to that of the United States, including domestic legislation and enforcement of the program. NMFS agrees that these issues are a critical part of a regulatory program and they will be considered.

Comment 17: One commenter discussed their opposition to state finning bans that are being considered for possible adoption.

Response: NMFS cannot address state finning bans in this rulemaking.

#### Proposed Changes to the IUU Fishing Definition

Comment 18: One commenter suggested that the goal of the proposed regulation is to address stateless vessels in the world's oceans that are not abiding by rules applicable to the U.S. fishermen are subject to. Therefore, they would like the IUU fishing definition amended to include stateless vessels that are engaged in IUU fishing.

Response: The Moratorium Protection Act authorizes NMFS to identify nations for having vessels engaged in IUU fishing, bycatch of protected living marine resources, and shark catch beyond any national jurisdiction. The fishing activities of stateless vessels cannot be addressed under the Moratorium

Protection Act. IUU fishing activities by stateless vessels can be addressed pursuant to provisions of a number of international instruments, including the FAO Port State Measures Agreement, which will require the denial of access to ports and/or the withholding of port services to IUU vessels, including stateless vessels.

Comment 19: Several commenters suggested that the definition of IUU fishing be identical to the characterization of IUU fishing that was included in the FAO Port State Measures Agreement. This characterization of IUU fishing refers to the activities set out in paragraph three of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (see <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>).

Response: The Moratorium Protection Act sets forth the minimum elements that must be included in the definition of IUU fishing for purposes of the Act. The characterization of IUU fishing that was included in the FAO Port State Measures Agreement serves a different purpose than the definition of IUU fishing for purposes of the Moratorium Protection Act. Under the FAO Port State Measures Agreement, States and other entities commit to adopt measures to strengthen their ports against IUU fisheries products and to enhance port State measures through flag State control. Thus, the characterization of activities

that can be considered IUU fishing under the FAO Port State Measures Agreement is broad enough to address specific fishing activities by individual vessels. In contrast, the Moratorium Protection Act provides authority to identify and certify nations for having vessels engaged in IUU fishing, which is defined based on statutory guidelines. For example, the fishing activities of stateless vessels, which are addressed under the Port State Measures Agreement, cannot be addressed under the Moratorium Protection Act, which establishes a process to identify and certify nations, rather than nations' vessels, to promote sustainable fishing activities by their vessels.

In addition, NMFS is not expanding the IUU fishing definition in this final rule to encompass RFMOs to which the United States is not a member because it could result in a nation's identification for violations of international measures to which the United States is not bound, and was not involved in developing.

#### IUU Fishing Definition as it Addresses Impacts to Vulnerable Marine Ecosystems

Comment 20: Several commenters expressed concern about the aspect of the IUU fishing definition that pertains to fishing activities that adversely impact vulnerable marine ecosystems (VMEs). Specifically, they requested that NMFS delete the term

"significant" before "adverse impact," so that the VME aspect of the IUU fishing definition can be interpreted more broadly.

Response: In the current regulations, NMFS harmonized the applicable section of the IUU definition to be consistent with international norms of the United Nations General Assembly and FAO. NMFS added "significant" before "adverse impact" in the definition to reflect the standard of significant adverse impact as established in United Nations General Assembly Resolutions 61/105, 64/72, and 66/88, as well as the FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas.

#### Classification

This final rule is published under the authority of the Moratorium Protection Act, 16 U.S.C. 1826d-1826k, as amended by the Shark Conservation Act (Public Law 111-348).

This rulemaking has been determined to be significant for the purposes of Executive Order 12866.

Pursuant to 5 U.S.C 553(d)(3), NOAA finds that there is good cause to waive the 30-day delay in the effective date of this rule. This rule is procedural in nature: it only creates procedures for the agency to follow when determining the identification and certification of nations whose fishing vessels are engaged in shark catch beyond any national jurisdiction. Importantly, the rule does not modify, add, or

revoke any existing rights and obligations of the public or any private parties, because the rule only applies to NOAA. Once this final rule is implemented, the public is not required to take any action to come into compliance. Accordingly, NOAA finds that there is good cause, within the meaning of 5 U.S.C 553(d)(3), to waive the 30-day delay in effectiveness of this rule and to make this rule effective immediately.

Pursuant to section 605 of the Regulatory Flexibility Act, at the proposed rule stage, the Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration that this final rule would not have a significant economic impact on a substantial number of small entities. NMFS did not receive any comments on that certification. For any questions about the certification, please contact NMFS at the contact provided under "FOR FURTHER INFORMATION."

This final rule contains collection-of-information requirements for §§ 300.206(b)(2), 300.207(c), and 300.208(c) subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). The collection-of-information requirements have been approved by OMB under control number 0648-0651.

List of Subjects in 50 CFR Part 300



Administrative practice and procedure, Bycatch, Exports, Fish, Fisheries, Fishing, Imports, IUU Fishing, Marine resources, Reporting and recordkeeping requirements, Sharks, Treaties, Wildlife.

Dated: January 10, 2013.

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Alan D. Risenhoover,  
Director, Office of Sustainable Fisheries,  
performing the functions and duties of the  
Deputy Assistant Administrator for Regulatory  
Programs.

For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

PART 300--INTERNATIONAL FISHERIES REGULATIONS

1. The authority citation for part 300 continues to read as follows:

Authority: Moratorium Protection Act, 16 U.S.C. 1826d-1826k

2. Section 300.200 is revised to read as follows:

§ 300.200 Purpose and scope.

The purpose of this subpart is to implement the requirements in the High Seas Driftnet Fishing Moratorium Protection Act ("Moratorium Protection Act") to identify and certify nations whose vessels engaged in illegal, unreported, or unregulated fishing; whose fishing activities result in bycatch of protected living marine resources; or whose vessels engaged in fishing activities or practices on the high seas that target or incidentally catch sharks where the nation has not adopted a regulatory program for the conservation of sharks, comparable in effectiveness to that of the United States, taking into account different conditions. This language applies to vessels entitled to fly the flag of the nation in question. Where the Secretary of Commerce determines that an identified nation has not taken the necessary actions to warrant receipt of a positive certification, the Secretary of Commerce may recommend to the President that the United States prohibit the importation of certain fish and fish products from the identified nation or other measures. The Secretary of Commerce will recommend to the President appropriate measures, including trade restrictive measures, to be taken against identified nations that have not received a positive certification, to address the fishing

activities or practices for which such nations were identified in the biennial report. The Secretary of Commerce will make such a recommendation on a case-by-case basis in accordance with international obligations, including the World Trade Organization (WTO) Agreement. The Moratorium Protection Act also authorizes cooperation and assistance to nations to take action to combat illegal, unreported, or unregulated fishing, reduce bycatch of protected living marine resources, and achieve shark conservation.

3. In § 300.201, the definition of "Illegal, unreported, or unregulated (IUU) fishing" is revised to read as follows:

§ 300.201 Definitions.

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Illegal, unreported, or unregulated (IUU) fishing means:

(1) In the case of parties to an international fishery management agreement to which the United States is a party, fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including but not limited to catch limits or quotas, capacity restrictions, bycatch reduction requirements, shark conservation measures, and data reporting;

(2) In the case of non-parties to an international fishery management agreement to which the United States is a party,

fishing activities that would undermine the conservation of the resources managed under that agreement;

(3) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures, or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; or,

(4) Fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement.

(5) Fishing activities by foreign flagged vessels in U.S. waters without authorization of the United States.

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4. In § 300.202, paragraphs (a)(2) and (d)(1) are revised to read as follows:

§ 300.202 Identification and certification of nations engaged in illegal, unreported, or unregulated fishing activities.

(a) \*\*\*

(2) When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will take into account all relevant matters, including but not limited to the

history, nature, circumstances, extent, duration, and gravity of the IUU fishing activity in question, and any measures that the nation has implemented to address the IUU fishing activity.

NMFS will also take into account whether an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes place. If such an organization exists, NMFS will consider whether the relevant international fishery management organization has adopted measures that are effective at addressing the IUU fishing activity in question and, if the nation whose fishing vessels are engaged, or have been engaged, in IUU fishing is a party to, or maintains cooperating status with, the organization. NMFS will also take into account any actions taken or on-going proceedings by the United States and/or flag State to address the IUU fishing activity of concern as well as the effectiveness of such actions.

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(d) \*\*\*

(1) The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that such nation has taken appropriate corrective action to address the activities for which such nation has been identified in the biennial report to Congress. When making such

determination, the Secretary shall take into account the following:

(i) Whether the government of the nation identified pursuant to paragraph (a) of this section has provided evidence documenting that it has taken corrective action to address the IUU fishing activity described in the biennial report;

(ii) Whether the relevant international fishery management organization has adopted and, if applicable, the identified member nation has implemented and is enforcing, measures to effectively address the IUU fishing activity of the identified nation's fishing vessels described in the biennial report;

(iii) Whether the United States has taken enforcement action to effectively address the IUU fishing activity of the identified nation described in the biennial report; and

(iv) Whether the identified nation has cooperated in any action taken by the United States to address the IUU fishing activity described in the biennial report.

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5. In 300.203, paragraphs (a)(1), (a)(2), and (c)(1) are revised; paragraph (c)(2) is redesignated as paragraph (c)(3), and a new paragraph (c)(2) is added to read as follows:

§ 300.203 Identification and certification of nations engaged in bycatch of protected living marine resources.

(a) \*\*\*

(1) NMFS will identify and list, in the biennial report to Congress nations—

(i) whose fishing vessels are engaged, or have been engaged during the preceding calendar year prior to publication of the biennial report to Congress, in fishing activities or practices either in waters beyond any national jurisdiction that result in bycatch of a PLMR, or in waters beyond the U.S. EEZ that result in bycatch of a PLMR that is shared by the United States;

(ii) if the nation is a party to or maintains cooperating status with the relevant international organization with jurisdiction over the conservation and protection of the relevant PLMRs, or a relevant international or regional fishery organization, and the organization has not adopted measures to effectively end or reduce bycatch of such species; and

(iii) the nation has not implemented measures designed to end or reduce such bycatch that are comparable in effectiveness to U.S. regulatory requirements, taking into account different conditions that could bear on the feasibility and efficacy of comparable measures.

(2) When determining whether to identify nations as having fishing vessels engaged in PLMR bycatch, NMFS will take into account all relevant matters including, but not limited to, the history, nature, circumstances, extent, duration, and gravity of the bycatch activity in question.

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(c) \*\*\*

(1) Initiate consultations within 60 days after submission of the biennial report to Congress with the governments of identified nations for the purposes of encouraging adoption of a regulatory program for protected living marine resources that is comparable in effectiveness to that of the United States, taking into account different conditions, and establishment of a management plan that assists in the collection of species-specific data;

(2) Seek to enter into bilateral and multilateral treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

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§§ 300.204, 300.205, 300.206, and 300.207 [Redesignated as §§ 300.205, 300.206, and 300.207, 300.208]

6a. Sections 300.204, 300.205, 300.206, and 300.207 are redesignated as §§ 300.205, 300.206, and 300.207, 300.208, respectively.

6b. A new § 300.204 is added to read as follows:

§ 300.204 Identification and certification of nations whose vessels are engaged in shark catch.

(a) Procedures to identify nations if fishing vessels of that nation are engaged in fishing activities or practices in waters



beyond any national jurisdiction that target or incidentally catch sharks during the preceding calendar year.—(1) NMFS will identify and list in the biennial report to Congress nations—

(i) Whose fishing vessels are engaged, or have been engaged during the calendar year prior to publication of the biennial report to Congress, in fishing activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks; and

(ii) Where that nation has not adopted a regulatory program to provide for the conservation of sharks, including measures to prohibit removal of any of the fins of a shark (including the tail) and discard the carcass of the shark at sea, that is comparable in effectiveness to that of the United States, taking into account different conditions, including conditions that could bear on the feasibility and effectiveness of measures.

(2) When determining whether to identify nations for these activities, NMFS will take into account all relevant matters including, but not limited to, the history, nature, circumstances, duration, and gravity of the fishing activity of concern.

(b) Notification of nations identified as having fishing vessels engaged in fishing activities or practices that target or incidentally catch sharks. Upon identifying in the biennial report to Congress a nation whose vessels engaged in fishing

activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will notify identified nations about the requirements under the Moratorium Protection Act and this subpart N.

(c) Consultations and negotiations. Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will:

(1) Initiate consultations within 60 days after submission of the biennial report to Congress with the governments of identified nations for the purposes of encouraging adoption of a regulatory program for the conservation of sharks that is comparable in effectiveness to that of the United States, taking into account different conditions, and establishment of a management plan that assists in the collection of species-specific data;

(2) Seek to enter into bilateral and multilateral treaties or other arrangements with such nations to protect sharks; and

(3) Seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report

and, as necessary, request the Secretary of State to initiate the amendment of any existing international treaty to which the United States is a party for the conservation of sharks to make such agreements consistent with this subpart.

(d) International Cooperation and Assistance. To the greatest extent possible, consistent with existing authority and the availability of funds, the Secretary shall:

(1) Provide appropriate assistance to nations identified by the Secretary under paragraph (a) of this section and international organizations of which those nations are members to assist those nations in qualifying for a positive certification under paragraph (e) of this section;

(2) Undertake, where appropriate, cooperative research activities on species assessments and harvesting techniques aimed at mitigating or eliminating the non-target catch of sharks, with those nations or organizations;

(3) Encourage and facilitate the transfer of appropriate technology to those nations or organizations to assist those nations in qualifying for positive certification under paragraph (e) of this section; and

(4) Provide assistance to those nations or organizations in designing, implementing, and enforcing appropriate fish harvesting plans for the conservation and sustainable management of sharks.

(e) Procedures to certify nations identified as having fishing vessels engaged in fishing activities or practices that target or incidentally catch sharks. Each nation that is identified as having fishing vessels engaged in fishing activities or practices in waters beyond any national jurisdiction that target or incidentally catch sharks and has not adopted a regulatory program for the conservation of sharks, including measures to prohibit removal of any of the fins of a shark (including the tail) and discard the carcass of the shark at sea, that is comparable to that of the United States, taking into account different conditions, shall receive either a positive or a negative certification from the Secretary of Commerce. This certification will be published in the biennial report to Congress. The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that:

(1) Such nation has provided evidence documenting its adoption of a regulatory program for the conservation of sharks that is comparable in effectiveness to regulatory measures required under U.S. law in the relevant fisheries, taking into account different conditions, including conditions that could bear on the feasibility and effectiveness of measures; and such nation has established a management plan that will assist in the collection of species-specific data on sharks to support

international stock assessments and conservation efforts for sharks.

(2) Prior to a formal certification determination, nations will be provided with preliminary certification determinations, and an opportunity to support and/or refute the preliminary determinations, and communicate actions taken to adopt a regulatory program that is comparable in effectiveness to that of the United States, taking into account different conditions. The Secretary of Commerce shall consider any relevant information received during consultations when making its formal certification determination.

7. Newly redesignated § 300.205 is revised to read as follows:

§ 300.205 Effect of certification.

(a) If a nation identified under § 300.202(a), § 300.203(a), or § 300.204(a) does not receive a positive certification under this subpart (i.e., the nation receives a negative certification or no certification is made), the Secretary of Treasury shall, in accordance with recognized principles of international law:

(1) Withhold or revoke the clearance required by section 91 of the Appendix to Title 46 for the fishing vessels of such nation; and

(2) Deny entry to the fishing vessels of such nation to any place in the United States and to the navigable waters of the United States.

(b) Upon notification and any recommendations by the Secretary of Commerce to the President that an identified nation has failed to receive a positive certification, the President is authorized to direct the Secretary of the Treasury to prohibit the importation of certain fish and fish products from such nation (see § 300.206).

(c) Any action recommended under paragraph (b) of this section shall be consistent with international obligations, including the WTO Agreement.

(d) If certain fish and fish products are prohibited from entering the United States, within six months after the imposition of the prohibition, the Secretary of Commerce shall determine whether the prohibition is insufficient to cause that nation to effectively address the IUU fishing, bycatch, or shark catch described in the biennial report, or that nation has retaliated against the United States as a result of that prohibition. The Secretary of Commerce shall certify to the President each affirmative determination that an import prohibition is insufficient to cause a nation to effectively address such IUU fishing activity, bycatch, or shark catch or that a nation has taken retaliatory action against the United

States. This certification is deemed to be a certification under section 1978(a) of Title 22, which provides that the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization.

(e) Duration of certification. Any nation identified in the biennial report to Congress for having vessels engaged in IUU fishing that is negatively certified will remain negatively certified until the Secretary of Commerce determines that the nation has taken appropriate corrective action to address the IUU fishing activities for which it was identified in the biennial report. Any nation identified in the biennial report to Congress for having vessels engaged in PLMR bycatch or catch of sharks that is negatively certified will remain negatively certified until the Secretary of Commerce determines that the nation has taken the necessary actions pursuant to the Moratorium Protection Act to receive a positive certification.

(f) Consultations. NMFS will, working through or in consultation with the Department of State, continue consultations with nations that do not receive a positive certification with respect to the fishing activities described in the biennial report to Congress. The Secretary of Commerce

shall take the results of such consultations into consideration when making a subsequent certification determination for each such nation.

8. In newly redesignated § 300.206, revise paragraphs (a)(1) through (3) and (b)(1), (2) and (4) to read as follows:  
§ 300.206 Denial of port privileges and import restrictions on fish or fish products.

(a) \*\*\*

(1) Vessels from a nation identified in the biennial report under § 300.202(a), § 300.203(a), or § 300.204(a) and not positively certified by the Secretary of Commerce that enter any place in the United States or the navigable waters of the United States remain subject to inspection and may be prohibited from landing, processing, or transshipping fish and fish products, under applicable law. Services, including the refueling and re-supplying of such fishing vessels, may be prohibited, with the exception of services essential to the safety, health, and welfare of the crew. Fishing vessels will not be denied port access or services in cases of force majeure or distress.

(2) For nations identified in the previous biennial report under § 300.202(a) that are not positively certified in the current biennial report, the Secretary of Commerce shall so notify and make recommendations to the President, who is authorized to direct the Secretary of Treasury to impose import



prohibitions with respect to fish and fish products from those nations. Such a recommendation would address the relevant fishing activities or practices for which such nations were identified in the biennial report. Such import prohibitions, if implemented, would apply to fish and fish products managed under an applicable international fishery agreement. If there is no applicable international fishery agreement, such prohibitions, if implemented, would only apply to fish and fish products caught by vessels engaged in illegal, unreported, or unregulated fishing. For nations identified under § 300.203(a) or § 300.204(a) that are not positively certified, the Secretary of Commerce shall so notify and make recommendations to the President, who is authorized to direct the Secretary of Treasury to impose import prohibitions with respect to fish and fish products from those nations; such prohibitions would only apply to fish and fish products caught by the vessels engaged in the relevant activity for which the nation was identified.

(3) Any action recommended under paragraph (a)(2) shall be consistent with international obligations, including the WTO Agreement.

(b) \*\*\*

(1) Notification. Where the Secretary of Commerce cannot make positive certifications for identified nations, and the President determines that certain fish and fish products from

such nations are ineligible for entry into the United States and U.S. territories, the Secretary of Commerce, in cooperation with the Secretaries of Treasury, Homeland Security, and State, will file a notice with the Office of the Federal Register.

(2) Certification of admissibility. If certain fish or fish products are subject to import prohibitions, NMFS may publish in the Federal Register the requirement that, in addition to any other import documentation requirements that otherwise apply, other fish or fish products from the relevant nation, that are not subject to the prohibitions, offered for entry under this section must be accompanied by certification of admissibility, for which a form is available from NMFS. The certification of admissibility must be properly completed and signed by a duly authorized official of the identified nation and validated by a responsible official(s) designated by NMFS. The certification must be signed by the importer of record and submitted to NMFS in a format (electronic facsimile (fax), the Internet, etc.) specified by NMFS.

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(4) Removal of negative certifications and import restrictions. Upon a determination by the Secretary of Commerce that an identified nation that was not certified positively has satisfactorily met the conditions in this subpart and that nation has been positively certified, the provisions of §

300.206 shall no longer apply. The Secretary of Commerce, in cooperation with the Secretaries of Treasury, Homeland Security, and State, will notify such nations and will file with the Office of the Federal Register for publication notification of the removal of the import restrictions effective on the date of publication.

9. In newly redesignated § 300.207, revise the section heading, and paragraph (c), and add paragraph (d) to read as follows:

§ 300.207 Alternative procedures for nations identified as having vessels engaged in IUU fishing activities that are not certified in this subpart.

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(c) In addition to any other import documentation requirements that otherwise apply, fish and fish products offered for entry under this section must be accompanied by certification of admissibility, for which a form is available from NMFS. The certification of admissibility must be properly completed and signed by a duly authorized official of the identified nation and must be validated by a responsible official(s) designated by NMFS. The certification must also be signed by the importer of record and submitted to NMFS in a format (electronic facsimile (fax), the Internet, etc.) specified by NMFS.

(d) Any action recommended under this section shall be consistent with international obligations, including the WTO Agreement.

10. In newly redesignated § 300.208, revise the section heading, and paragraph (c), and add paragraph (d) to read as follows:

§ 300.208 Alternative procedures for nations identified as having vessels engaged in bycatch of PLMRs that are not certified in this subpart.

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(c) In addition to any other import documentation requirements that otherwise apply, fish and fish products offered for entry under this section must be accompanied by certification of admissibility, for which a form is available from NMFS. The certification of admissibility must be properly completed and signed by a duly authorized official of the identified nation and must be validated by a responsible official(s) designated by NMFS. The certification must also be signed by the importer of record and submitted to NMFS in a format (electronic facsimile (fax), the Internet, etc.) specified by NMFS.

(d) Any action recommended under this section shall be consistent with international obligations, including the WTO Agreement.

11. Add § 300.209 to read as follows:

§ 300.209 Alternative procedures for nations identified as having vessels engaged in shark catch that are not certified in this subpart.

(a) These certification procedures may be applied to fish and fish products from a vessel of a harvesting nation that has been identified under § 300.204 in the event that the Secretary cannot reach a certification determination for that nation by the time of the next biennial report. These procedures shall not apply to fish and fish products from identified nations that have received either a negative or a positive certification under this subpart.

(b) Consistent with paragraph (a) of this section, the Secretary of Commerce may allow entry of fish and fish products on a shipment-by-shipment, shipper-by-shipper, or other basis if the Secretary determines that imports were harvested by fishing activities or practices that do not target or incidentally catch sharks, or were harvested by practices that-

(1) Are comparable to those of the United States, taking into account different conditions; and

(2) Include the gathering of species specific shark data that can be used to support international and regional assessments and conservation efforts for sharks.

(c) In addition to any other import documentation requirements that otherwise apply, fish and fish products offered for entry under this section must be accompanied by certification of admissibility, for which a form is available from NMFS. The certification of admissibility must be properly completed and signed by a duly authorized official of the identified nation and validated by a responsible official(s) designated by NMFS. The certification must also be signed by the importer of record and submitted to NMFS in a format (electronic facsimile (fax), the Internet, etc.) specified by NMFS.

(d) Any action recommended under this section shall be consistent with international obligations, including the WTO Agreement.

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